Supreme Court, U.S.
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In The Supreme Court of the United States

ERNESTO FRANCISCO COLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PROSECUTION OF THE PETITIONER
WAS BARRED BY HIS PRIOR
DRUG PROSECUTION IN THE
SOUTHERN DISTRICT
OF FLORIDA?

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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER

ERNESTO FRANCISCO COLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Petitioner, ERNESTO FRANCISCO COLE, respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review that part of the opinion and judgment of the United States Court of Appeals for the Fourth Circuit rendered and entered in Case No. 01-4574 on June 6, 2002, that affirmed Petitioner's conviction and sentence.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Fourth Circuit, No. 01-4574, affirming the Petitioner's conviction and sentence is attached as A-1 to the Appendix. The District Court Order Denying Petitioner's Motion to Dismiss is attached as A-2. The Judgment in the Criminal Case is attached as A-3.

JURISDICTION

Petitioner submits that Title 28 U.S.C. §1254(1) confers jurisdiction on this Court. Jurisdiction is further urged pursuant Supreme Court Rules 10.1 because the United States Court of Appeals for the Fourth Circuit has:

(a) rendered a decision in conflict with the decision of another United States Court of Appeal on the same matter;

(b) decided an important question of federal law which has not been, but should be, settled by this Court; and

(c) so far departed from the accepted and usual course of judicial proceedings and so far sanctions this departure by a lower court as to call for an exercise of this Court's power of jurisdiction.

QUESTION PRESENTED

WHETHER PROSECUTION OF THE PETITIONER WAS BARRED BY HIS PRIOR DRUG PROSECUTION IN THE SOUTHERN DISTRICT OF FLORIDA?

STATEMENT

(a)

On December 20, 2000, an Indictment was returned in United States District Court for the Eastern District for Virginia, Alexandria Division, charging the Petitioner with (Count One) conspiring from 1990 to on or about August 8, 2000 with others to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §841(a)(1) and §846, (Count Two) engaging in a Criminal Enterprise during that same time period in violation of 21 U.S.C. §848, (Count Three) causing the intentional killing of Armando Leguisamo-Castro aka "Ra-Ra" while engaged in the conspiracy charged in Count One in violation of 21 U.S.C. §848(e)(1)(A) and with (Count Four) knowingly and willfully killing said Armando-Leguisamo-Castro aka "Ra-Ra" by causing him to die by asphyxiation in violation of 18 U.S.C. §1111 and §2.

A pretrial Motion to Dismiss Counts One, Two, and Three alleging that prosecution of these counts was barred by a prior drug prosecution against the Petitioner in the United States District Court for the Southern District of Florida was denied by the Court. Renewals of that motion throughout the trial which commenced on April 10, 2001 were also denied.

Further immediately prior to trial the Government dismissed Count Four of the Indictment. On April 17, 2001, the jury found the Petitioner guilty as to all remaining counts. A post-trial motion for Judgment of Acquittal or in the alternative for New Trial was denied. On July 20, 2001, the Petitioner was sentenced to concurrent life sentences as to Counts Two and Three, five years Supervised Release, $100 Special Assessment as to each Count and a fine of $10,000. The Court at the same time dismissed the Count One conviction upon the Government's motion that said conviction could not stand as a lesser included offense of the Count Two CCE conviction.

On June 6, 2002 the Fourth Circuit Court of Appeals affirmed the Petitioner's conviction and sentence.

(b)

On July 14, 1998, DEA intercepted a suspicious package at Federal Express in Beltsville, Maryland. One kilogram of cocaine was discovered within the package and following a controlled delivery, Roberto Cruz was arrested. Cruz identified the Petitioner as his source of supply for the kilogram of cocaine. The Petitioner lived in Miami and Cruz recorded phone calls to him while cooperating.

A little over a year later, on October 28, 1999, DEA agents in Richmond, Virginia seized 5 kilograms of cocaine that was being transported from Miami to New York via Amtrak by Frank Wall. Wall also identified the Petitioner as his source for the cocaine and a series of recorded phone calls were conducted by Wall's brother to the Petitioner in Miami verifying Wall's identification. As a result of these two seizures, the Petitioner was arrested in Miami and charged with Federal narcotics offenses in December of 1999. An indictment was then returned against him in the Southern District of Florida charging him with (Count I)

conspiring from July 19, 1998 to November, 1999 to distribute cocaine, (Count II) possession with intent to distribute cocaine on July 14, 1998 in Miami and (Count III) possession with intent to distribute cocaine on October 28, 1999 in Miami. The Petitioner subsequently pled guilty to Count III of that indictment pursuant to plea agreement wherein the Government agreed to dismiss Counts I and II in return for his guilty plea. He was then sentenced on September 29, 2000, to 78 months imprisonment as to Count III and the Court, pursuant to the plea agreement, on the Government's motion, dismissed Counts I and II. At trial the defense admitted the above facts and conceded that the Petitioner had previously pled guilty. The defense denied the other allegations of the Government.

The Government's case in chief included testimony from Roberto Cruz and Frank Wall with respect to their arrest and the seizure of cocaine in Maryland and Virginia. The Government's allegations, however, went beyond those two incidents as they presented witnesses, mainly testifying under cooperation agreements with the Government, who described the Petitioner's alleged ongoing drug activities beginning as early as 1990 in Washington, D.C. In addition, the Government asserted that the Petitioner was responsible for the death of one Armando Leguisamo-Castro aka "Ra-Ra" whose partially decomposed body was found in the trunk of an abandoned rental car by U.S. Park Police in Arlington, Virginia on June 14, 1991.

Roberto Cruz testified as to his arrest in Maryland in July, 1998, and identified the Petitioner as the supplier of the kilogram seized. Taped phone calls made by him to the Petitioner after agreeing to cooperate were introduced into evidence.

Cruz met the Petitioner at Willie Lora's Body Shop in Washington and started buying cocaine from him. Besides the kilo seized by the Government, Cruz testified that in January of 1998, he had also obtained 2 kilos from the Petitioner that he transported to Washington and sold. Cruz recalled that the Petitioner told him he robbed people in New York, Washington and Miami and that he had shot some guys in Miami.

Frank Wall testified that on October 27, 1999 he was arrested aboard a northbound train outside of Richmond. Five kilograms of cocaine which had been supplied to him by the Petitioner were seized. He immediately began cooperating with the Government. He testified that he met the Petitioner when he moved from New Jersey to Miami in early 1998. Eventually he began assisting the Petitioner in collecting drug money for him and lived in a condominium owned by the Petitioner. According to Wall the Petitioner told him that he had been selling cocaine since coming to the in United States from Panama about 15 years ago. Wall, testified that the Petitioner told him that prior to living in Miami he had sold cocaine in New York and Washington D.C. and now sent drugs to the D.C. area by the auto train.

Wall stated that the Petitioner told him that he would get his cocaine into Miami from Panama with the assistance of longshoremen at the Port of Miami and Wall indicated that he had met two of the longshoreman. He recalled shipments of 10, 40 and 140 kilograms coming through the port and the five kilograms that he was arrested for in Virginia came from the last 40 kilogram shipment that had been imported. According to Wall couriers from Panama who were supposed to carry drug money back to Panama stayed at the Petitioner's condo.

Wall also testified that the Petitioner and one of his associates named Tito had a falling out over some money that was missing from a New York sale. Suspecting that Tito had stolen the money, Wall testified the Petitioner went to Tito's house and stuck a gun in his mouth before taking Tito's watch, jewelry and other items to repay the debt. Wall further stated that the Petitioner one time told him that he had shot a man in D.C. over a drug debt and put him in the trunk of a car which was left in a park. Further, the Petitioner told him that on another occasion that the Petitioner had threatened the mother of a man he had shot not to go to the police. Also, the Petitioner boasted that a man had been shot in the back seat of a car by one of the Petitioner's associates as a result of a drug debt.

Lastly, Wall described an incident where he accompanied the Petitioner to a meeting with a Jamaican drug dealer in the Liberty City section of Miami. There the Petitioner robbed the Jamaican of several kilos of cocaine while shooting him multiple times in the process and leaving him for dead. After the Jamaican incident Wall apparently went back to New York to stay with his brother.

Joseph Wirtz, Frank Wall's brother assisted the authorities after Frank's arrest in a attempt to obtain a lower sentence for his brother. He made several taped phone calls to the Petitioner and attempted to arrange a delivery to the Petitioner of $75,000 as payment for the cocaine he had fronted Frank. These tapes were introduced into evidence at trial.

Ricardo Lora testified that he bought and sold cocaine since he arrived in this country in 1986 until he was arrested in 1997. According to Lora, the Petitioner was someone who supplied him with some of that cocaine after being introduced to him in early 1990. Their activity centered around a body shop in Washington, D.C. where

Lora's brother, Willie, would also install hidden compartments for drug dealers in cars. Lora testified that initially there were small transactions that progressed into multiple kilo purchases over the years. He testified that the Petitioner told him that he would send money to Miami and then to Panama from his drug sales and that the Petitioner had more than ten people working for him bringing cocaine up to Washington on the auto train from Florida. Lora also stated that the Petitioner would carry guns and that he and an associate by the name of Cholito Pete would rob and kill other drug dealers. On one occasion they had offered to assist Lora in killing a drug dealer who owed Lora money.

The Petitioner allegedly admitted to him that he had robbed and killed drug dealers in New York in a cocaine rip-offs. In another incident Lora attended a meeting near a car wash in Washington where the Petitioner and others were discussing getting into the heroin business. He remembered seeing numerous weapons at that meeting.

Lastly, Lora recalled a conversation that he had with his brother Willie after hearing reports that a man had been found dead in a trunk of a car. According to Lora, Willie told him that that Petitioner had something to do with it a result of money owed the Petitioner from a drug debt. Lora later asked the Petitioner about this and he testified that the Petitioner said the he "did what he had to do." According to Lora at the time the Petitioner also asked him to obtain the assistance of one of his drug customers to try and retrieve a blue BMW convertible from the police. Lora stated that the Petitioner told him he was driving that car when the guy got killed and the U.S. Park Police now had possession of the BMW. Lora admitted, however, that he had heard both on the news and from his brother that the man who had been found in the trunk that was a subject of these conversations had been shot in the back.

The parties stipulated as to testimony concerning the discovery of the body of Armando Leguisamo-Castro in the truck of an abandoned rental car at the Theodore Island Roosevelt Island Parking Lot of the George Washington Memorial Parkway in Arlington. The autopsy determined that Castro had died of asphyxiation. Further, the parties stipulated that there was no physical evidence that connected the Petitioner to that homicide. The car had been rented to Yvonne Marshall who lent it to Castro on the evening of June 12, 1991, the last time he was seen alive.

Charlton Dacres, now serving federal sentences for cocaine and passport fraud, testified that he began working in the Port of Miami as a longshoreman in 1992. Sometime thereafter he became involved with two Panamanians, Carlos Blanco and his father Arturo, in smuggling kilos of cocaine into the United States from Panama by way of containers carried on freighters sailing from Panama to the Port of Miami. Carlos Blanco was apparently arrested, after which Dacres attended a meeting in November 1997 at a bowling alley in Miami where he was introduced to the Petitioner as a replacement for Blanco. From this point on until Dacres was arrested on August 31, 1998, on his federal charges, he testified that he retrieved cocaine from various vessels coming from Panama for the Petitioner. According to Dacres the sizes of the shipments ranged from 15 kilograms to 88 kilograms with the last shipment occurring in August of 1998.

Dacres also testified about an incident in 1998 in which he stated that he assisted the Petitioner in robbing some Colombian drug dealers at gun-point of $600,000 in drug money at a warehouse in the Hallandale Beach area of Miami.

Kevin Funches, a prisoner at the Northern Neck Regional Jail Facilities in the winter of 2001 testified that he and been housed with the Petitioner in February and March of 2001 and that the Petitioner had discussed his case with him in the jail. Funches is a graduate of the University of Pennsylvania, with a record of nine felonies including seven fraud related charges and two escapes. According to Funches, the Petitioner said that he had heard that Funches was knowledgeable in the law and then proposed two hypotheticals to Funches. First the Petitioner wanted to know if someone committed a homicide but not on federal territory and the body was later found on federal territory could that person be convicted of murder federally. Secondly the Petitioner asked whether a person could be convicted for CCE if five people are involved in an offense though not at the same time.

Funches testified that at a later meeting with the Petitioner in the prison library that the Petitioner's hypotheticals became admissions and that the Petitioner admitted to him that he had someone killed and went on to say that the person was killed over money that was owed to him over drugs. According to Funches, the Petitioner admitted to him that the killing had occurred in the summer of 1991, that he had someone else do it, and that the victim was "asphyxiated" on the orders of the Petitioner. He said that the body had been dropped in Virginia in a trunk of a vehicle off of the George Washington Parkway and wrapped in plastic. Funches could not remember the name of the person the Petitioner told him did the killing. According to Funches the Petitioner also said that he had another one done in Florida six months before.

Funches also testified that the Petitioner told him about a prior case in Florida in which approximately a 40 kilograms of cocaine were seized in boxes of chocolate that were imported into the country. In that case two people were

arrested and the Petitioner had testified before the grand jury and at their trial. According to Funches the Petitioner admitted that the cocaine that had been seized in that case was actually the Petitioner's and that he had been untruthful in front of the jury. Funches also testified about details admitted to him in connection with the Frank Wall seizure of cocaine as well as using other couriers to carry cocaine north from Florida.

Funches swore that the only way he got the information was from conversations with the Petitioner and that he never saw the indictment in the case nor any of the pretrial pleadings that had been filed in which each of these specific aforementioned details had been discussed. The defense, however, presented evidence through a handwriting expert that notations written on the back of the last page of a copy of the indictment that was in the Petitioner's possession while in jail were written by Funches.

In April of 1996 Customs Agents in Miami intercepted a shipment from Panama of 400 boxes of chocolate that were x-rayed and found to contain cocaine hidden inside. Agents followed the shipment to a cargo broker where it was picked up and loaded onto a Ryder truck by Justin Cruz, Denny Sanchez and a third man known as Marcos. The truck was then driven to a mini storage facility. The majority of the boxes were unloaded. As Cruz and Sanchez left in the Ryder rental truck with five of the boxes they were stopped by police and three kilograms of cocaine were recovered from the five boxes. Another 23 kilograms were found in boxes inside the storage room. Both Cruz and Sanchez went to trial in Miami and were convicted.

The Petitioner at one time had leased the mini warehouse and was given immunity by the Government. At the 1996 trial the Petitioner testified as he had before the Grand Jury that he had no knowledge as to the cocaine hidden in the shipment.

Following his conviction, Sanchez agreed to cooperate and testified in the instant trial against the Petitioner identifying him as the man who had hired him and who had directed the off loading of the boxes at the mini storage facility. Cross-examination, however, of the agents who had conducted surveillance at both the cargo broker and the off loading at the mini facility revealed that none had been able to identify the Petitioner as having been present.

Ida Stanford, a witness who had been placed in the witness protection program in an unrelated case, testified that in the early nineties she was cooking powder cocaine into crack on a weekly basis for a number drug dealers in Washington including one named Javier Card. In late 1990 Card brought the Petitioner to her house and she observed guns in his possession that he was supplying for Card. About three weeks later Card again brought the Petitioner to her house and she declined to cook a kilo of cocaine that he had into crack.

Stanford became a close friend of Armando Castro in fall of 1990 and began cooking crack on a weekly basis for him and his partner Julito. Sometime after Julito was killed in February 1991 Stanford learned through Castro that he was being supplied with cocaine by the Petitioner. Stanford was shot outside her house in a drive by shooting on May 28, 1991. According to Stanford, Castro would get his cocaine on consignment from the Petitioner and was always in debt.

In December 1998 Miami Police Detective arrested Juan Carlos Avila for depositing thousands of dollars into different accounts owned by Colombians at numerous Miami banks. At the time that Avila was arrested approximately $78,000 in currency was seized from him. Avila began cooperating and testified at trial. He testified that the $78,000 was the remainder of $110,000 that had been delivered to him by the Petitioner the previous day. He converted some of the money into money orders and deposited them into the bank accounts. The next day while cooperating, Avila met with the Petitioner and received a package from him containing an additional $15,000. The Petitioner was subsequently stopped by police as he left the scene but state charges were ultimately dismissed against him.

In late 1998 the Petitioner and one of his associates Carlos Munoz invested $75,000 in Agra Yacht Services a Yacht repair business in Miami. The owner of this business, Jose Agra, testified that the investment was to start a marine supply store at the business. Sometime later Agra had a falling out with the Petitioner and wanted him out of the business. For over a year Agra paid the Petitioner back while writing him weekly checks but Agra testified that under the Petitioner's direction these checks were payments for wages so that he could have some documentation that he was legitimately employed.

Lastly, the Government also offered evidence that the Petitioner had filed no income tax return for the tax years 1990 through 1993. In 1994 he filed a return and claimed that he earned $18,000 as a mechanic at Willie's Collision Repair and Painting in Washington and in 1999 he had received $32,600 as non employee compensation from Agra Yacht Services.

REASONS FOR GRANTING CERTIORARI

I. This Court has not yet ruled on whether a prior section §846 lesser included drug distribution conspiracy conviction prohibits a successive prosecution for CCE?

In December of 1999, the Petitioner was charged by indictment in the Southern District of Florida with (Count I) conspiracy from July 1998 to November 1999 to distribute cocaine, (Count II) possession with intent to distribute cocaine on July 14, 1998 in Miami, and (Count III) possession with intent to distribute cocaine on October 28, 1999 in Miami. These charges were based upon the seizures of cocaine in connection with the arrests of Robert Cruz in July of 1998 in Maryland and Frank Wall in October of 1999 in Richmond, Virginia.

The Petitioner subsequently entered into a plea agreement with the Government whereby he pled guilty to Count III of that indictment in return for dismissal of Counts I and II. Thereafter, he was sentenced to 78 months imprisonment on September 29, 2000.

Prior to trial the Petitioner moved to dismiss Count One, Two, and Three of the instant prosecution alleging that they were barred by the prior case in Florida, but the Court denied this motion and the Fourth Circuit Court of Appeals affirmed.

The Petitioner asserts that the Trial Court and the Fourth Circuit erred in their rulings. The conspiracy charged in Miami was a lesser included offense of the conspiracy, CCE, and murder in furtherance of the conspiracy charges here. As such prosecution was barred as violative of the plea agreement entered into in the Miami case as well as rights

guaranteed the Petitioner under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The conspiracy charged in Count One of the Virginia indictment clearly encompassed the time frame that was charged in the Miami Indictment. Both conspiracies charged conspiracy to distribute cocaine and both involved allegations of the transportation of cocaine from Miami to the Maryland, Washington, Virginia area. Further, the individuals involved in the Miami conspiracy. Roberto Cruz and Frank Wall, were key witnesses for the Government here and their testimony was not limited to allegations that the Petitioner simply provided cocaine to them that was seized at the time of their arrests. Cruz testified that the Petitioner had been selling cocaine to him first in Washington at Willie Lora's Body Shop and then in Miami for transportation to D.C. for years. He testified that the Petitioner and associates had been involved in drug rip-offs.

Wall of course, described the Petitioner's alleged importation of drugs through the Port of Miami as well as the use of couriers to send money back to Panama. He described a drug rip-off that he had been involved in with the Petitioner in Miami where a drug dealer was allegedly killed. He further testified to the Petitioner's alleged admission to him about his long time drug dealings and implied that he had admitted being involved in the homicide charged in Count Three.

Surely had the case gone to trial in Miami, the testimony of Cruz and Wall would have been the same. Thus, there is no question that the conspiracy charged in Miami was part of the same conspiracy charged in Virginia. Indeed, that the Government utilized the same evidence that led to the Miami Indictment to prove the conspiracy count and the murder while engaged in t he conspiracy is *prima facie* evidence of such.

As to whether the Miami conspiracy should have been deemed a lesser included offense of the CCE charge barring prosecution in Virginia, the trial court ordered the CCE sentence to run concurrently with the Miami sentence as the Government conceded it was a lesser included conviction of the CCE. In this regard, this Court in *Rutledge v. United States*, 517 U.S. 292, 116 S. Ct. 1241 (1996) specifically held that a §846 conspiracy to distribute was a lesser included offense of a §848 CCE charge and that convictions for both amounted to improper cumulative punishments. In so doing this Court has resolved any conflict among the Circuits as to whether a prior drug conspiracy can be a lesser included offense of a CCE charge.[1]

This Court in *Rutledge,* however, declined at that time to address successive prosecutions involving §846 and §848:

> In certain circumstances, it may be that the Government will investigate and prosecute an individual for one or more §846 conspiracies without being aware of facts that would justify charging a defendant with a violation of §848 as well.

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[1] See *United States v. McHan*, 966 F.2d 134 (4th Cir. 1992); *United States v. Harvey*, 78 F.3d 01 (11th Cir. 1996).

> Moreover, a lesser included §846 conspiracy may not always be coterminous with the larger CCE. Because neither instance is true here, we need not explore the consequences of our holding today for purposes of the successive prosecution strand of the Double Jeopardy Clause, (citations omitted) nor need we address how prior convictions for lesser included §846 offenses should be handled for purposes of entering judgment if the later §848 conviction is obtained but then set aside.
>
> *Id.* 116 S.Ct. 1250 at n.17

The Petitioner asserts that the instant case is a proper case for this Court to reach that question.

Contrary to the Fourth Circuit ruling, this was not a question of the Government's becoming aware after the Florida prosecution of an entirely new dimension of criminal misconduct implicating separate offenses. The only piece of evidence that the government claims it was not aware of at the time of the Florida prosecution concerned the payroll checks that were being paid to the Petitioner from Jose Agra after Petitioner's arrest in Florida. Of course, money laundering is not a predicate offense of CCE and there is no question that the last controlled substance offense alleged was the one connected to Frank Wall's arrest. Accordingly, this Court should grant certiorari to determine whether the Government was barred from prosecuting the Petitioner in Virginia.

CONCLUSION

For the above-stated reasons, the Petitioner respectfully requests that this Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit be granted.

Respectfully submitted,

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No. ____

IN THE
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ERNESTO FRANCISCO COLE,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ERNESTO FRANCISCO COLE, a/k/a La Pe, a/k/a Panama, a/k/a Negro, a/k/a Negrito,
Defendant-Appellant.

No. 01-4574

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Gerald Bruce Lee, District Judge.
(CR-00-455)

Argued: April 5, 2002

Decided: June 6, 2002

Before WILKINSON, Chief Judge, and MICHAEL and TRAXLER, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Michael and Judge Traxler joined.

COUNSEL

ARGUED: Thomas Franklin Almon, Jr., THOMAS F. ALMON ATTORNEY, Miami, Florida, for Appellant. William Neil Hammerstrom, Jr., Assistant United States Attorney, Alexandria, Virginia, for Appellee. **ON BRIEF:** Paul J. McNulty, United States Attorney,

Gene Rossi, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

OPINION

WILKINSON, Chief Judge:

Ernesto Francisco Cole appeals the judgment of the district court sentencing him to concurrent terms of life imprisonment for operating a continuing criminal enterprise and committing murder while engaged in drug trafficking. *See* 21 U.S.C. § 848. Cole argues that this prosecution was barred by his prior prosecution in Florida, that the government's belated disclosure of *Brady* material deprived him of his right to confrontation and to a fair trial, and that the trial judge erred in failing to recuse himself after disclosing his relationship to a government witness. Because each of these claims lacks merit, we affirm.

I.

On December 20, 2000, Ernesto Cole was indicted in the Eastern District of Virginia for conspiring to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count One), operating a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848 (Count Two), and committing murder while engaged in drug trafficking in violation of 21 U.S.C. § 848(e)(1)(A) (Count Three). The government alleged and showed at trial that Cole operated an extensive drug organization over a ten-year period — from "in or about 1990" to "on or about August 8, 2000." Cole's operation included the importation of hundreds of kilograms of cocaine by over fifteen other conspirators from Panama, through the Port of Miami, into the United States. Further, hundreds of kilograms of cocaine were distributed in south Florida and hundreds of kilograms were delivered to eastern Virginia, after which they were sold to others in and around Washington, D.C. Moreover, Cole was involved in acts of money laundering, violence, and murder to further his drug enterprise.[1]

[1]Cole was initially charged in a one-count CCE indictment on August 2, 2000, which covered the time period from "in or about 1990" to "on

Both before and during trial, Cole moved to dismiss all three counts of the indictment on the ground that they were barred by his prior drug conspiracy prosecution in the Southern District of Florida. In December 1999, Cole had been indicted in Florida for conspiracy to distribute cocaine from July 1998 to November 1999, as well as for two counts of possession with intent to distribute cocaine — on July 14, 1998 and October 28, 1999 in Miami. These charges were based on cocaine seizures in connection with the arrests of Robert Cruz in Maryland and Frank Wall in Virginia. Cole pleaded guilty to one count of possession in return for the dismissal of the other counts. The district court in Florida sentenced him to seventy-eight months imprisonment on September 29, 2000.

The district court in the instant case denied Cole's motions to dismiss, concluding that the present prosecution was not barred by either the Florida plea agreement or the Double Jeopardy Clause of the Fifth Amendment. The court thus determined that the Florida conspiracy was not the same offense as the conspiracy and CCE charges here for purposes of successive prosecution analysis.

In addition, the district court informed the parties just before the jury was selected that one of the government's witnesses, Kevin Funches, was the son of his deceased godparents. Based on this disclosure, Cole made a recusal motion "in an abundance of caution" in order to avoid "an appearance of partiality in light of the relationship." The trial judge denied the request for recusal, concluding that he had not had any contact with Funches for over ten years, and thus would have no problem being impartial in presiding over the trial.

Finally, Cole made motions to strike Funches' testimony, grant a mistrial, or grant a new trial based on the government's late, partial production of *Brady* material concerning Funches' extensive history of mental health problems. *See Brady v. Maryland*, 373 U.S. 83 (1963). Cole alleged that the government's failure to timely turn over Funches' complete psychiatric records denied him the right to effec-

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or about December 9, 1999." On December 12, 2000, the government discovered evidence of Cole's money laundering, which expanded the ending date charged in the instant indictment to August 8, 2000.

tively cross-examine Funches and impeach his credibility with an expert. The district court denied Cole's motions because the government's disclosure was not so late as to prevent Funches from being cross-examined on his psychiatric problems, and because the disclosed materials did not indicate that Funches' disorders had any bearing on his ability to recall events and tell the truth.

On April 17, 2001, the jury found Cole guilty on all counts. The district court then vacated the Count One drug conspiracy conviction on motion of the government because it was a lesser included offense of the Count Two CCE charge. The court sentenced Cole to concurrent terms of life imprisonment on Counts Two and Three, and ordered that they run concurrently with his seventy-eight month sentence in the Southern District of Florida. Cole now appeals.

II.

A.

Cole again asserts that his prosecution is barred by double jeopardy principles. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. One component of this constitutional guarantee prohibits successive prosecutions for the "same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *see also United States v. McHan*, 966 F.2d 134, 137 (4th Cir. 1992); *United States v. Ragins*, 840 F.2d 1184, 1187 (4th Cir. 1988). The Clause thus "provid[es] criminal defendants with a measure of finality and repose," ensuring that one who has endured "the ordeal of criminal prosecution through to judgment" will not be retried "for the same alleged misconduct." *Ragins*, 840 F.2d at 1188. At the same time, however, there is no constitutional immunity from prosecution for distinct criminal activity.

B.

Cole argues that the conspiracy charge in his previous prosecution in Florida was a lesser included offense of the charges for conspiracy, CCE, and murder in furtherance of the conspiracy in contention here. He asserts that the present prosecution is therefore barred because it

violates the Florida plea agreement and his rights under the Double Jeopardy Clause.

We disagree. The conspiracy alleged in the Florida indictment does not bar prosecution on the much more extensive conspiracy and CCE crimes charged here. We address each instant conviction in turn.[2]

1.

Because the Double Jeopardy Clause bars successive prosecutions for the same offense, it forbids "the division of a single criminal conspiracy into multiple violations of a conspiracy statute." *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *see also McHan*, 966 F.2d at 137; *Ragins*, 840 F.2d at 1188. We employ a flexible, "totality of the circumstances" test to determine whether successive conspiracy charges constitute the "same offense." *McHan*, 966 F.2d at 137-38; *Ragins*, 840 F.2d at 1188; *MacDougall*, 790 F.2d at 1144. Specifically, we consider the following five factors in assessing the validity of a double jeopardy attack on a second indictment for conspiracy:

> (1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as co-conspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated.

McHan, 966 F.2d at 138; *see also Ragins*, 840 F.2d at 1188-89; *MacDougall*, 790 F.2d at 1144.

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[2]Though the court below vacated the conspiracy conviction, a finding of guilt on that count is a predicate to a finding of guilt on the charge for murder while engaged in drug trafficking. We therefore must decide whether the Florida conspiracy is the same offense as the instant conspiracy.

Each of these factors supports the view that the instant conspiracy is not the same offense as the Florida conspiracy. To begin with, whereas the Florida conspiracy covered a mere sixteen months, here the conspiracy encompasses a ten-year period. Further, the Florida case concerned offense conduct based on just two distinct drug distributions — Cole's July 1998 distribution in Miami to Roberto Cruz, which was later shipped to Cruz's residence in Greenbelt, Maryland, and the October 1999 seizure from Frank Wall in Hanover, Virginia, which Cole had supplied. Here, by contrast, the evidence includes the widespread importation of cocaine from Panama into Miami, and its eventual delivery to Virginia and Washington, D.C.

Moreover, the evidence underlying the Florida indictment implicated only Wall and Cruz as coconspirators. This case, on the other hand, has involved more than fifteen people who conspired with Cole. In addition, the overt acts associated with the Florida indictment centered around the two drug distributions just discussed. In stark contrast, the overt acts of the ten-year conspiracy charged here are, as the government notes, "virtually countless." This is because the nature and scope of the instant offense activities are far more extensive than the conduct charged in Florida.

The government emphasized this point to the district court at sentencing:

> What our investigation uncovered and what the evidence adduced at trial established was that this defendant employed violence and committed countless murders to further a business of flooding the streets with massive amounts of cocaine over a ten-year period.
>
> And based on what we know about this defendant, I can honestly say that there may never be a more violent person to come before this Court.

The district court agreed with the government's assessment. It said to Cole that "given the extensive evidence presented at the trial about your involvement in the importation of thousands of pounds of cocaine into the country in a widespread distribution network from

Florida to New York, the sentence here seems to be warranted by the evidence."

It is not merely the case that the instant indictment alleges violations of CCE and murder statutes in addition to violations of the distribution and conspiracy statutes charged in Florida. There is also substantial evidence that the present conspiracy implicated the illegal importation of drugs, the use of firearms in connection with drug trafficking, and money laundering. Indeed, whereas the two distributions at issue in the Florida case involved one kilogram and 4.955 kilograms of cocaine, respectively, this prosecution concerned the importation and widespread distribution of hundreds of kilograms of cocaine.

Cole claims that Cruz and Wall were key government witnesses in the instant case, and that their testimony was not limited simply to allegations that Cole had provided them with cocaine that was seized when they were arrested. He further submits that had the Florida case gone to trial, their testimony would surely have been the same there as it was here. He concludes from these assertions that "there is no question that the conspiracy charged in Miami was part of the same conspiracy charged here."

But we cannot reverse a district court's findings based on speculation about what would have happened in another criminal proceeding had it turned out differently. And even if we were to assume the validity of Cole's hypothetical contentions, a host of differences between the two conspiracies still remain — for example, the substantive statutes alleged to have been violated, the evidence of money laundering, the dates of the conspiracies, and the critical evidence provided by such other "key" government witnesses as Kevin Funches. Thus, consideration of each element of the "totality of the circumstances" test compels the same conclusion: The Florida conspiracy and the instant conspiracy are not remotely the "same offense" in the eyes of the Double Jeopardy Clause. *See Brown*, 432 U.S. at 165; *McHan*, 966 F.2d at 137; *Ragins*, 840 F.2d at 1187. Accordingly, Cole's murder conviction is not barred.

2.

Cole also maintains that the present prosecution is barred because the Florida conspiracy is a lesser included offense of the instant CCE

charge. He acknowledges our holding in *McHan* that the use of a conspiracy to which a defendant pleaded guilty as an element of a CCE charge did not violate the Double Jeopardy Clause. *See* 966 F.2d at 141. He further concedes that *McHan* relied upon *Garrett v. United States*, 471 U.S. 773 (1985), and *United States v. Felix*, 503 U.S. 378 (1992). In *Garrett*, the Supreme Court rejected a double jeopardy challenge to a CCE conviction where the defendant had previously pleaded guilty to a predicate crime of importing marijuana. Similarly, *Felix* allowed a conspiracy prosecution after the defendant had been convicted of an underlying substantive offense. In both cases, the Court stressed "the multilayered conduct, both as to time and to place," implicated in CCE and conspiracy offenses. *Garrett*, 471 U.S. at 789; *see also Felix*, 503 U.S. at 390.

Cole submits, however, that "the reasoning of *McHan* has been seriously undermined" by the Supreme Court's subsequent decision in *Rutledge v. United States*, 517 U.S. 292 (1996). In *Rutledge*, the Court held that the "in concert" element of the CCE offense requires proof of a conspiracy that would also violate § 846, and thus that § 846 does not define a different offense from the CCE defined in § 848. Rather, "it is appropriate to characterize § 846 as a lesser included offense of § 848." *Id.* at 300. The Court further observed that *Garrett* "merely adhered to our understanding that legislatures have traditionally perceived a qualitative difference between conspiracy-like crimes and the substantive offenses upon which they are predicated." *Id.* at 300 n.12. "In contrast to the crimes involved in *Garrett*," the Court noted that "this case involves *two* conspiracy-like offenses directed at largely identical conduct." *Id.*

Cole is thus correct that a § 846 conspiracy is a lesser included offense of a § 848 CCE — so long as essentially the same agreement forms the basis for both. He is also accurate in observing that whereas the predicate offenses at issue in *Garrett* and *Felix* were substantive, this case, like *Rutledge*, involves a conspiracy as a predicate offense. *See, e.g., United States v. Singleton*, 177 F. Supp. 2d 12, 29-30 (D.D.C. 2001).

But these are distinctions without a difference to the outcome of this appeal. That is because *Rutledge* was not a successive prosecution case. Rather, the defendant there was prosecuted simultaneously

for, *inter alia*, conspiracy and CCE, which is why the Court understood the scenario before it to involve offenses "directed at largely identical conduct." *Rutledge*, 517 U.S. at 300 n.12. But given that the conspiracy and CCE charges here are based on the same agreement (which is why the conspiracy conviction was vacated as a lesser included offense of the CCE), it follows from our application of the "totality of the circumstances" test in the preceding section that the same agreement did *not* form the basis for the Florida conspiracy charge and the instant CCE conviction.

Indeed, it was only in the simultaneous-prosecution context that the Court in *Rutledge* found a double jeopardy violation. The Court ended its opinion by so limiting the scope of its holding:

> In certain circumstances, it may be that the Government will investigate and prosecute an individual for one or more § 846 conspiracies without being aware of facts that would justify charging a defendant with a violation of § 848 as well. Moreover, a lesser included § 846 conspiracy may not always be coterminus with the larger CCE. Because neither instance is true here, we need not explore the consequences of our holding today for purposes of the successive prosecution strand of the Double Jeopardy Clause . . . .

Id. at 307 n.17 (citing *Diaz v. United States*, 223 U.S. 442, 448-49 (1912); *Brown*, 432 U.S. at 169 n.7; *Garrett*, 471 U.S. at 786-93).

The Court in *Rutledge* was thus sensitive to a basic distinction between simultaneous and successive prosecution cases. In the simultaneous prosecution context, the government's knowledge of the defendant's activities is fixed by definition at the time of trial, and separate charges are prosecuted in the same proceeding for reasons of efficiency. A successive prosecution case, by contrast, often occurs because the government learns more after the initial prosecution about the nature and extent of the defendant's criminal misconduct. This is not to say, of course, that the government should be allowed to reprosecute a defendant any time new and highly probative evidence turns up. The Double Jeopardy Clause does not permit reprosecution simply because the government discovers "more evidence strengthening its case." *Ragins*, 840 F.2d at 1193. However, prosecution is not

barred when the government becomes aware of an entirely new dimension of criminal misconduct implicating separate offenses.

This pattern is born out here. The instant prosecution involves misconduct vastly more serious than the previously charged offenses. For example, there is substantial evidence that in furtherance of his drug operations, Cole shot one drug dealer multiple times, ordered the killing of another person who was stuffed in the trunk of a car over a drug debt, and threatened the mother of another man he had shot, all of which involved a magnitude of activity wholly different from what was at issue in the Florida proceeding. In addition, though the parties dispute exactly what the government knew about Cole's drug enterprise in the previous case, Cole does not contest the government's contention that it was unaware of his money laundering until a week before the present case was indicted.[3] And significantly, there is no finding below that the government acted in bad faith by proceeding piecemeal with prosecutions when it had the evidence to bring the instant charges in the Florida case.

The Double Jeopardy Clause may not "be employed to force the Government's hand" by requiring it to prosecute Cole for either the earlier conspiracy or the later CCE, but not both. *Garrett*, 471 U.S. at 790. Rather, "[o]ne who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting." *Id.*

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[3]It is also noteworthy that Cole stands convicted of operating a CCE until August 8, 2000. By contrast, the ending date in the Florida case was November 1999. Thus, the Florida conspiracy was not "coterminus with the larger CCE." *Rutledge*, 517 U.S. at 307 n.17. Rather, the CCE continued for roughly nine more months as a result of Cole's laundering of drug proceeds during that time.

Cole argues that "[m]oney laundering . . . is not a predicate offense of a CCE charge, and there is no question that the last controlled substance offense alleged was the one connected with Frank Wall's arrest." But this contention is irrelevant. Evidence that Cole engaged in money laundering is highly probative of the government's CCE allegations against him because it suggests that the money constitutes the proceeds of his drug distribution enterprise. Thus, his laundering of drug money justifies the ending date in the present indictment.

Cole's contention ultimately comes down to this: Because he has already been prosecuted for committing some comparatively minor crimes in Florida, the government should be precluded from prosecuting him for some truly horrendous acts in Virginia. But the Florida conspiracy and the CCE did not involve "largely identical conduct." *Rutledge*, 517 U.S. at 300 n.12. Nor was the government "aware of facts" in the Florida proceeding that were critical to the CCE charges here. *Id.* at 307 n.17. And finally, the Florida conspiracy was not "coterminus with the larger CCE." *Id.* For all of these reasons, the instant CCE conviction is not barred by the conspiracy count in the Florida indictment.[4]

III.

Cole next argues that the district court erred in not crediting his objections to the government's belated disclosure of *Brady* material concerning Funches' long history of psychiatric problems. Cole relates that Funches was the key government witness with respect to the Count Three murder charge. Funches testified that while he and Cole were incarcerated, Cole confessed to him that he had ordered the murder of Armando Leguisamo-Castro over a drug debt. Cole's counsel was not aware of Funches' psychiatric history at the time Funches initially testified. Rather, he learned about it over the extended weekend break following the government's direct case, when he discovered letters Funches wrote to various courts from prison. It was only after raising this issue with the prosecution that same weekend that he

[4]We note that the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), likewise does not bar prosecution on the CCE offense. The Florida conspiracy charge and the instant CCE conviction are not the "same offense" under *Blockburger* because the criminal activity at issue here is so multilayered. *See Garrett*, 471 U.S. at 789; *Felix*, 503 U.S. at 390; *McHan*, 966 F.2d at 140. It is true that the Supreme Court in *Rutledge* distinguished *Garrett* and *Felix* as involving substantive predicate offenses, as opposed to § 846 predicates. *See* 517 U.S. at 300 n.12. But it is equally true that here, unlike in *Rutledge*, the CCE conviction is significantly more multilayered than the predicate conspiracy. Both *Garrett* and *Felix* stressed the dangers of transposing "single course of conduct" analysis to situations where the greater offense was multilayered as to time and place.

received part of Funches' presentence report ("PSR") in his latest criminal case, which described his psychiatric history.

Cole asserts that he was entitled to view Funches' complete psychiatric records. He further claims that the government's late, partial disclosure contravened *Brady* and *United States v. Bagley*, 473 U.S. 667 (1985), by denying him the right to effectively cross-examine Funches and impeach his credibility with an expert.

We may reverse the district court's denials of Cole's various motions only for an abuse of discretion. *See United States v. Gravely*, 840 F.2d 1156, 1162-63 (4th Cir. 1988) (motion to strike); *United States v. Dorlouis*, 107 F.3d 248, 257 (4th Cir. 1997) (motion for mistrial); *United States v. Huggins*, 191 F.3d 532, 536 (4th Cir. 1999) (motion for new trial). In reviewing the court's decision on these motions, we find no abuse of discretion in this case.

We certainly do not commend the government for not turning over excerpts of Funches' PSR until the weekend after it completed its direct case against Cole. As any practicing lawyer will attest, one can almost always do a better job with information when one has had more time to prepare. However, under *Brady* and its progeny, the failure to disclose evidence favorable to the accused violates due process only "where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. Evidence is material where "its suppression undermines confidence in the outcome of the trial" — that is, where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 678, 682.

No such reasonable probability exists here in view of the abundance of material that Cole's counsel had at his disposal to effectively impeach Funches. To begin with, Funches was cross-examined about his nine felony convictions, including seven for fraud. Further, Cole's handwriting expert seriously impugned Funches' credibility when he testified that Funches' writing was on the copy of the indictment that was in Cole's possession in jail. Funches had denied ever seeing the indictment, instead claiming that he had learned everything he knew about the case from Cole. Moreover, Funches conceded that he hoped to receive a sentence reduction for cooperating against Cole.

In addition, Cole's counsel ultimately cross-examined Funches at length about his psychiatric history. Funches admitted that he had been treated in the past for bipolar disorder and borderline personality disorder, and that he had received five court-ordered psychological evaluations. He also was cross-examined about his confession to his probation officer that he provided false information on his 1988 psychological examination.[5] Thus, Cole's counsel did receive enough information about Funches' disorders "in time for its effective use at trial." *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985).

It may be inferred from all of this impeachment evidence that the jury knew Funches was essentially a con artist, but that it convicted Cole on all counts anyway. It did so in part because it believed that Funches' testimony, which had been corroborated by others, truthfully described Cole's crimes. In any event, because Funches had been "impeached in so many other ways," *United States v. Hoyte*, 51 F.3d 1239, 1243 (4th Cir. 1995), there exists no reasonable probability that the outcome of Cole's trial would have been any different if Cole's counsel had timely received Funches' complete psychiatric records. Accordingly, the district court did not abuse its discretion in denying Cole's *Brady* motions.

IV.

Finally, Cole argues that the district court erred in denying his recusal motion after the trial judge revealed that Funches was the son of his deceased godparents. In making the motion, Cole "in no way questioned" the trial judge's integrity, but rather argued "that there was no way of foreseeing what if any issues may arise during the trial with respect to Funches which may necessitate rulings by the Court which might give rise to an appearance of partiality in light of the relationship."

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[5]The PSR also stated that Funches was "not currently taking any psychotropic medications," that he had been declared competent to continue with previous legal proceedings against him, and that prior PSRs indicated "no history of illicit drug use."

Reviewing the district court's denial of Cole's recusal motion for abuse of discretion, *see United States v. DeTemple*, 162 F.3d 279, 283 (4th Cir. 1998), we disagree. The standard for recusal is not so readily met. As the trial judge informed the litigants, he had not had any contact whatever with Funches for over ten years. And the last time he did see Funches, the trial judge was practicing law and happened to walk into the courtroom where Funches was being sentenced. The judge further related that he had reviewed Canon 3C of the Code of Judicial Conduct for United States Judges (Disqualification), as well as 28 U.S.C. § 455 (Disqualification) and 28 U.S.C. § 144 (Bias or prejudice). Finally, he stressed that he could be fair and impartial in presiding over the trial and issuing various rulings.

This explanation and these assurances dispelled any reasonable concern that the trial judge was somehow biased by virtue of the fact that he knew Funches. There is simply no evidence that the judge's "impartiality might reasonably be questioned," or that "he ha[d] a personal bias or prejudice concerning a party." 28 U.S.C. § 455. In *United States v. Lovaglia*, 954 F.2d 811 (2d Cir. 1992), our sister circuit held that recusal was not required in a case involving a family whose businesses were victimized by the defendants' RICO violations because, *inter alia*, the judge had not had a social relationship with the family for seven or eight years prior to the sentencing proceedings. *Id.* at 816-17. Here, it was over ten years since the trial judge had had *any* contact with Funches, let alone a social relationship.

Cole claims that the denial of his *Brady* motions regarding Funches' psychiatric history created an appearance of partiality requiring recusal. But we have already held that it was not an abuse of discretion to deny them. Further, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . . Almost invariably, they are proper grounds for appeal, not for recusal." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (internal citation omitted). Thus, the district court did not abuse its discretion in denying Cole's recusal motion.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No.
	)	00-4550A
ERNESTO COLE	)	

ORDER

The matter is before the court on defendant's motion to dismiss Counts One, Two and Three of the Indictment as being in violation of the Double Jeopardy Clause and the plea agreement entered into between defendant and the government in the southern District of Florida. By Order dated March 2, 2001, the motion was denied to the extent defendant sought dismissal based on violation of the Double Jeopardy Clause, and deferred to the extent he sought dismissal based on successive prosecutions. The parties filed supplemental memoranda on the successive prosecution issue and the matter is now ripe for disposition.

For reasons to be stated in forthcoming memorandum opinion, it is hereby **ORDERED** that defendant's motion to dismiss Counts One, Two and Three of the Indictment as being in violation of the Double Jeopardy Clause and the plea agreement entered in to between defendant and the government in the

Southern District of Florida is **DENIED.** [1]

The Clerk is directed to send a copy of this Order to all counsel or record.

/s

Alexandria, VA
April 6, 2001

T.S. Ellis III
United States District Judge

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[1] Also deferred in the March 2, 2001 Order was defendant's motion to preclude the government from presenting at trial testimony relating to or deriving form immunized testimony. Disposition of this motion is left to the trial judge.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT of VIRGINIA
Alexandria Division

FILED JUL 20 2001
U.S. DISTRICT COURT
ALEXANDRIA, VA

UNITED STATES OF AMERICA

v. Case No. 1:00CR00455-001

ERNESTO FRANCISCO COLE,

Defendant

JUDGMENT IN A CRIMINAL CASE

The defendant, ERNESTO FRANCISCO COLE, was represented by Thomas F. Almon, Esquire and F. Andrew Carroll, III, Esquire.

The defendant was found guilty on count(s) 2 and 3 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date of offense Concluded	Count Number(s)
21:848	Continuing Criminal Enterprise	8/8/00	2
21:848(e)(1)(A)	Murder while engaged in drug trafficking	6/21/91	3

On motion of the United States, the court has dismissed count(s) 1 and 4.

As pronounced on July 20, 2001, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the united States Attorney for this district within 30 days of any changes of name, residence, or mailing address until all fines, restitution, cost, and special assessments imposed by this judgment are fully paid.

Signed this 20th day of July, 2001.

/s

Gerald Bruce Lee
United States District Judge

Defendant's SSN: 021-66-3261
USM#: 44020-083
Defendant's Date of Birth: 12-23-64
Defendant's Mailing Address: c/o F. Andrew Carroll, III, Esquire, 112 S. Alfred Street Suite 300, Alexandria, VA 22314
Defendant's Residence Address: Same

Defendant: ERNESTO FRANCISCO COLE
Case Number: 1:00cr00455-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life. The term of life is as the Counts 2 and 3. Terms are concurrent with one another and shall run concurrent with the sentenced imposed in the U.S. District Court, Southern District of Florida.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

P.O.(2)(3)
Mshl. (4)(2)
U.S. Coll.
Dft. Consl.
PTS Financial
_____
Registrar
ob

_____
United States Marshal

By: _____
Deputy Marshal